

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

ROBERT D. LAMBERT, #16846

PETITIONER

VS.

CIVIL ACTION NO.: 3:04cv299BN

ROBERT MINGO AND
JIM HOOD, Attorney General

RESPONDENTS

REPORT AND RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE

Robert Lambert filed his Petition for Writ of Habeas Corpus in this cause on April 30, 2004. It is now before the undersigned upon the Motion to Dismiss For Failure to Exhaust filed by the Respondents. The Petitioner has not responded to the motion.

Lambert was convicted of burglary and sexual battery in the Circuit Court of Lincoln County, Mississippi, and sentenced to serve concurrent terms of (1) eight years on Count One with the last five years to be served on post-release supervision; and, (2) a term of eight years as to Count Two with the last five years to be served on post-release supervision. The terms were to be served in the custody and control of the Mississippi Department of Corrections. **Exhibit A** to Respondents' Motion to Dismiss.

Lambert perfected a direct appeal to the Mississippi Supreme Court and in October, 1998, the Mississippi Court of Appeals affirmed his judgment of conviction and sentence by unpublished opinion. **Exhibit B.** Lambert was released on Earned Release Supervision on August 30, 2000. After his release, on February 10,

2001, Lambert began serving the post-release supervision portion of his sentence. He allegedly violated the terms of his probation, and on January 29, 2003, a probation revocation hearing was conducted in the circuit court. By Order filed February 7, 2003, Lambert's probation was revoked by the Lincoln County Circuit Court. He filed a motion for post-conviction relief in that court on September 5, 2003. **Exhibit D.** On October 13, 2003, that motion was denied by the circuit court. **Exhibit E.** He then appealed the circuit court's denial of post-conviction relief to the Mississippi Supreme Court. **Exhibit F.**

At the time the Respondents filed the instant motion, Lambert's appeal in the Mississippi Supreme Court was still pending. Therefore, his state court remedies were unexhausted, and the Respondents requested that his federal habeas petition be dismissed without prejudice. Since that time, the Mississippi Court of Appeals has entered a decision denying Lambert's motion for post-conviction relief. According to the court's docket, a decision was rendered on October 26, 2004, and the mandate was issued on November 16, 2004.

The Mississippi court's ruling renders moot the Respondents' Motion to Dismiss for Failure to Exhaust. The Petitioner apparently has now exhausted his state court remedies, and this case should proceed on the docket of this court.

It is the recommendation of the undersigned United States Magistrate Judge that the Respondents' Motion to Dismiss for Failure to Exhaust [#7] be **denied**. The Respondents should be granted thirty days from the date of the Order adopting this Report and Recommendation to file additional responsive pleadings in this cause.

The parties are hereby notified that failure to file written objections to the proposed findings, conclusions, and recommendation contained within this report and recommendation within ten (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. 28 U.S.C. § 636, Douglass v. United Services Auto. Ass'n., 79 F.3d 1415, 1428-29 (5th Cir. 1996).

THIS the 24th of January, 2005.

/S Alfred G. Nicols, Jr.
UNITED STATES MAGISTRATE JUDGE